IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 12/03/2003

Coram

The Hon'ble Mr.Justice P.D.DINAKARAN

Criminal Appeal No.649 of 1996

Harichandran @ Saravanan .. Appellant

-Vs-

State,
rep. by Inspector of Police,
Papparapatti Police Station
Crime No.150/89. .. Respondent

Prayer:- Appeal against the order of conviction and sentence dated 2 6.8.1996 passed by the learned Principal Sessions Judge, Krishnagiri at Dharmapuri, in Sessions Case No.43 of 1992.

!For Appellant : Mr.C.Pandian

^For Respondent : Mr.V.Jayaprakash Narayanan,
Govt. Advocate (Crl. Side)

:J U D G M E N T

In this appeal, the appellant assails the judgment of the learned Principal Sessions Judge, Krishnagiri at Dharmapuri, dated 26.8.1996 in Sessions Case No.43 of 1992, convicting him for the offences punishable under Sections 304 Part I and 307 I.P.C. and sentencing him to undergo rigorous imprisonment for five years and three years for the said offences respectively, directing both the sentences to run concurrently, for having caused the death of his wife, Dayawathi, and for having attempted to murder P.W.4.

2. According to the prosecution, a lascivious relationship between P.W.4 and Dayawathi (deceased), who is nonetheless the wife of the accused, was the motive behind the crime in question, as spoken by the Village Administrative Officer (P.W.1), the paramour of the deceased (P.W.4), the father of P.W.4 (P.W.7) and the Investigating Officers (P.Ws.10 and 11). However, it is trite law that a mere existence of such motive, by itself, is not sufficient to determine the criminal character of an accused, as the prosecution is bound to prove the charges against the accused beyond all

reasonable doubts, failing which, the accused is entitled to be acquitted.

3. The sheet-anchor of the case of the prosecution is the extrajudicial confession statement (Ex.P1) said to have been made by the accused before the Village Administrative Officer (P.W.1), in the presence of one Muniyan, at 6.30 a.m. on 17.5.1989 at Pannaikulam Village, which is 2 Kms. away from the place of occurrence, namely, Kittampatti Village, stating that the accused had pushed his wife Dayawathi (deceased) and the paramour of the deceased (P.W.4), into a well belonging to P.W.4, at about 10.30 p.m. on 16.5.1989.

4. As per the evidence of P.W.1, the accused was the Secretary of the "Youth Welfare Association" of the Kittampatti village and P.W.4 was the Treasurer. Both of them were related and moving closely. P.W.4 used to visit the house of the accused frequently six months prior to the occurrence and developed illicit intimacy with Dayawathi (deceased). The deceased used to beat the children for no reason. Doubting the conduct of the deceased, the accused enquired the deceased about her relationship with P.W.4, to which the deceased confessed her guilt and pleaded pardon. However, the accused decided to kill Dayawathi (deceased) and her paramour (P.W.4).

5. As per the extra-judicial confession statement (Ex.P1), on the date of occurrence, the accused after his dinner, under the pretext of sleeping, was observing his wife Dayawathi (deceased), who removed her anklets and went away. The accused followed her till she reached the well belonging to P.W.4, where P.W.4 was waiting for Dayawathi (deceased). The accused heard the deceased telling P.W.4 that they should stop the illicit intimacy as her husband (accused) had come to know the same. The deceased also informed P.W.4 that the child in her ovum was conceived through P.W.4. The moment the accused overheard the above conversation between his wife (deceased) and P.W.4, he decided to kill both of them. The accused pushed P.W.4 into the well first. In the meanwhile, as the deceased ran away out of fear, the accused chased and caught her and pushed her also into the well. The entire occurrence had taken place at about 10.30 p.m. on 16.5.1989. Believing both Dayawathi (deceased) and P.W.4 would have died, the accused left to Kittampatti village to hide himself till the morning when he met the Village Administrative Officer (P.W.1) at Pannaikulam and gave an extra-judicial confession (Ex.P1) at about 6 a.m. on 17.5.1989 .

6. Speaking about the said extra-judicial confession statement (Ex. P1), the Village Administrative Officer (P.W.1) deposed that the extra-judicial confession statement (Ex.P1) was obtained in the presence of one Muniyan, the Village Assistant of Pannaikulam village, with whom he went to the scene of occurrence and found that the body of the deceased (Dayawathi) was floating. As per the information gathered by P.W.1, one Gopal (P.W.7), the father of P.W.4, took P.W.4 to K.N. Rao Hospital at Salem for treatment. After preparing a report (Ex.P2) at the place of occurrence, P.W.1 took the accused to Papparapatti Police Station and handed over the accused along with Exs.P1 and P2.

7. On receipt of Exs.P1 and P2, the Head Constable Thiru.Jayaraman

(P.W.8) registered a First Information Report (Ex.P3), at about 9.30 a.m. for the offences punishable under Section 302 I.P.C. for having murdered Dayawathi (deceased) and Section 307 I.P.C. for having attempted to murder P.W.4.

8. According to P.W.1, the Inspector of Police, Pennagaram Police Station (P.W.10) came to the Papparapatti Police Station at about 10.45 a.m., enquired the accused and also recorded a confession statement from the accused.

9. It was further narrated by P.W.1 that all three of them, namely P.W.1, the investigating officer (P.W.10) and the accused, went back to the place of occurrence at about 12 noon on 17.5.1989 and P.W.10 prepared an Observation Mahazar (Ex.P4) and a Rough Sketch (Ex.P8) in the presence of P.W.1 and one Shanmugam, and both the observation Mahazar (Ex.P4) and rough sketch (Ex.P8) were duly vouched by P.W.1 and the said Shanmugam.

10. Based on Exs.P1 and P2 and the evidence of the Village Administrative Officer (P.W.1), the investigating officers (P.W.10) and his successor (P.W.11) investigated into the matter, examined Raman, Mathesh, Nynagounder and P.W.3 on 25.2.1990; P.W.4 on 30.3.1990; and P.W.6 and P.W.7 on 10.5.1990; recorded their statements, and filed a final report against the accused on 17.11.1990 charging him for the offences punishable under Sections 302, 316 and 307 I.P.C. Since the accused denied the charges, he was tried in Sessions Case No.43 of 1992 on the file of the Principal Sessions Judge, Dharmapuri at Krishnagiri. On being questioned under Section 313 Cr.P.C., the accused specifically denied the extra-judicial confession statement (Ex.P1) and claimed that he was falsely implicated in the above crime and therefore, pleaded innocence.

11. To substantiate the charges framed against the accused, 11 witnesses were examined and 9 exhibits were marked, of them, the following are relevant to be mentioned:

(i)P.W.1 is the Village Administrative Officer, who recorded the extra-judicial confession statement (Ex.P1) said to have been made by the accused. P.W.1 also prepared a report (Ex.P2) and handed over the accused and Exs.P1 and P2 to Papparapatti Police Station;
(ii)P.W.2 is the Doctor, who treated P.W.4 through whom Ex.P5 - Wound Certificate of P.W.4 was marked;
(iii)P.W.3 is the Doctor, who conducted post mortem on the body of the deceased Dayawathi, through whom the requisition letter to conduct post mortem and the Post Mortem Certificate were marked as Exs.P6 and P7 respectively;
(iv)P.W.4 is the paramour of Dayawathi (deceased), who is nonetheless the wife of the accused;
(v)P.W.5, Somarajan, got into the well, lifted and bailed out P.W.4;
(vi)P.W.6, Jayagopal, spoke about the shifting of P.W.4 to K.N.Rao Hospital at Salem by engaging a taxi;
(vii)P.W.7 is the father of P.W.4, who deposed about the lifting of P.W.4 from the well;

(viii) P.W.8, Thiru.Jayaraman, is the Head Constable at Papparapatti Police Station, who registered the F.I.R. (Ex.P3) before whom the accused was produced by P.W.1;
(ix)P.W.9, Thiru.Rathinasamy, was deputed to hand over the F.I.R. to the Court and also to the Investigating Officer (P.W.10); and
(x)P.W.10 is the Investigating Officer, who conducted initial investigation and prepared an Observation Mahazar (Ex.P4), a Rough Sketch (Ex.P8) and an inquest report (Ex.P9); and
(xi)P.W.11 is the Investigating Officer, who succeeded P.W.10 and completed the investigation.

12. The learned Principal Sessions Judge, Krishnagiri, in the light of the above evidence on record, by judgment dated 26.8.1996 in S.C.No.43 of 1992:
i.acquitted the accused from the offence punishable under Section 316 I.P.C.;
ii.converted the offence punishable under Section 302 I.P.C. as an offence punishable under Section 304 Part I I.P.C. and convicted the accused for the same and sentenced him to undergo rigorous imprisonment for five years for having caused the death of his wife Dayawathi by pushing her in the well;
iii.also convicted the accused for the offence under Section 307 I.P.C. and sentenced him to undergo rigorous imprisonment for three years for having attempted to murder P.W.4; and
iv.directed both the sentences to run concurrently.

Hence, the above appeal.

13. Mr.C.Pandian, learned counsel for the appellant contends that:
i.the prosecution had not explained the delay in registering the F.I.R.;
ii.the evidence of P.W.1 is not trustworthy;
iii.the prosecution failed to explain satisfactorily the reasons for the delay of ten months in examining the only eye-witness P.W.4 and therefore, the evidence of P.W.4 is also unbelievable;
iv.the conduct of P.W.4 and his father-P.W.7 are strange inasmuch as they failed to report the incident to the police immediately after the occurrence; and
v.the non-examination of one Mani, the person alleged to have first seen P.W.4 lying in the well vitiates the case of the prosecution.

14. On the other hand, Mr.V.Jayaprakash Narayanan, learned Government Advocate (Criminal Side) appearing for the respondent took me through the evidence of the prosecution witnesses and made submissions supporting the impugned judgment more or less on the reasons given by the trial Court in the impugned judgment.

15. I have given careful consideration to the submissions of both sides.

16. The case of the prosecution is based on (i) the extra judicial confession (Ex.P1), which is relied upon not only for the purpose of the existence of motive to commit the crime, but also to establish the commission of crime; (ii) the evidence of an ocular and injured witness P.W.4; and (iii)

the corroborative evidence of (a) P.W.1, the Village Administrative Officer; (b) P.W.2 and P.W.3, the medical witnesses; (c) P.W.5, who spoke about the rescuing of P.W.4 from the well; (d) P.W.6, who shifted P.W.4 to K.N.Rao Hospital at Salem; (e) P.W.7, the father of P.W.4; (f) P.W.8 and P.W.9, the police constables, who registered the complaint and handed over the FIR copy to the Court as well as to P.W.10; and (g) P.W.10 and P.W.11, the investigating Officers, who conducted investigation.

17.1. It is well settled in law that when the case of the prosecution is based on an extra-judicial confession, it may not be safe to convict the accused based on such extra-judicial confession, if the same is retracted by the accused in the Court by way of a total denial, as in the instant case. Hence, the extra-judicial confession statement relied upon by the prosecution (Ex.P1) must be scrutinised with greater care and caution, not being carried away merely based on the motive of the accused for committing the crime as set forth by the prosecution.

17.2. Admittedly, the prosecution relies upon two confession statements, namely, (i) the extra-judicial confession said to have been made by the accused before the Village Administrative Officer (P.W.1) in the presence of the Village Assistant (Muniyan); and (ii) the confession statement made by the accused before the Investigating Officer (P.W.10) during the police custody in the presence of P.W.1 and one Nyna Gounder, which was neither produced before the Court nor marked during the trial.

17.3. For placing reliance on Ex.P1, extra-judicial confession, the prosecution is bound to satisfy the Court that the same was made voluntarily, as it is the obligation of the prosecution to prove the charges beyond all reasonable doubts.

17.4. Even though Ex.P1 was said to have been recorded by P.W.1 in the presence of Muniyan, there is no proper explanation by P.W.1 for not getting the said statement attested by the said Muniyan. Though a specific question was put to P.W.1 in the cross examination for not getting the signature of Muniyan as attestor to Ex.P1, there was no convincing explanation for the same, nor the prosecution explained for not examining the said Muniyan to establish that the extra judicial confession (Ex.P1) had been made voluntarily.

17.5. When sufficient evidence was available to establish that the extra-judicial confession (Ex.P1) was made voluntarily by examining the other only witness, namely, Muniyan, who was said to be present at the time of recording the extra judicial confession (Ex.P1), I do not see any reason for not examining the said Muniyan to prove that the said extra-judicial confession statement (Ex.P1) was made voluntarily, which in my considered opinion, is the first set back to the case of the prosecution.

17.6. Assuming the motive of murder said to have been relied upon by the prosecution corroborates with the confession relied upon by the prosecution under Ex.P1, such motive, by itself, is not sufficient to conclude that extra-judicial confession (Ex.P1) was made voluntarily. In this regard,

we should not forget that Ex.P1 is not a judicial confession made before the Magistrate, which is protected under Section 164 Cr.P.C. with due precautions. The recording of confession by the Magistrate under Section 164 Cr.P.C. is very much reliable, as the same satisfies the precautions contemplated thereunder. In other words, even the judicial confession made before the Magistrate if lacks the precautions contemplated thereunder, is liable to be rejected, in the absence of any positive evidence that the precautions required under Section 164 Cr.P.C. were taken and a certificate required under Section 164(3) Cr.P.C. was not made duly appended to the recorded confession. In the instant case, as already found, the extrajudicial confession statement (Ex.P1) relied upon by the prosecution could not be relied upon as there is no proper explanation by the prosecution for the failure in examining the Village Assistant, Muniyan, who was said to be present at the time of recording the extra-judicial confession statement (Ex.P1).

17.7. Coming to the other confession said to have been made by the accused in the Police Station at about 10.45 a.m. on 17.5.1989 in the presence of P.W.1 and one Nyna Gounder, as already observed, the said confession statement was neither produced before the Court nor marked during the trial. Even though P.W.1 had also stated that a confession statement was recorded by the Investigating Officer (P.W.10) in the presence of P.W.1 and the said Nyna Gounder, and both of them attested the same, the said confession statement was neither produced before the Court, nor marked during the trial, nor the said Nyna Gounder was examined on behalf of the prosecution. Therefore, the reliance placed on the confession statement said to have been made before the Investigating Officer (P.W.10) is also liable to be rejected.

18.1. P.W.1 deposed that after recording Ex.P1, he took the accused along with the said Muniyan to the scene of occurrence and found the body of the deceased was floating and thereafter, proceeded to Papparapatti Police Station to hand over the accused at 8.30 a.m. on 17.5.1 989. The Head Constable (P.W.8), who registered the F.I.R. at 9.30 a.m. on 17.5.1989, deposed that the accused was handed over to him at Papparapatti Police Station only at 9.30 a.m. There is absolutely no explanation by P.W.1 as to what had happened between 8.30 and 9.30 a.m. after reaching Papparapatti Police Station. Had the accused been produced at 8.30 a.m., what was the reason for P.W.8 to depose that the accused was taken on judicial custody only at 9.30 a.m. while P. W.10 deposed that he arrived at Papparapatti Police Station only at 10 .45 a.m. and recorded the second confession statement in the presence of P.W.1 and one Nyna Gounder, who was not examined. I do not see any justified reason for the lapses on the part of the prosecution for not examining the said Nyna Gounder.

18.2. P.W.1 further deposed that he along with P.W.10 and one Shanmugam came to the scene of occurrence at 12 noon on the same day and P.W.10 prepared Ex.P4 Observation Mahazar and Ex.P8 Rough Sketch, duly attested by P.W.1 and the said Shanmugam, who was not examined. In the cross examination, P.W.1 deposed that he had prepared three copies of report at 8.30 a.m. when he came to the scene of occurrence along with the accused and the said Muniyan, and forwarded one copy to the Magistrate. Except the one, which

was forwarded to P.W.8, the other two copies of the statement or report whatever prepared at the place of occurrence at 8.30 a.m. have not been produced before the Court. The lapses on the part of the prosecution in this regard create serious doubt on the case of the prosecution.

19.1. The next evidence relied upon by the prosecution is the direct testimony of P.W.4, against whom an attempt was made by the accused to murder, attracting Section 307 I.P.C. No doubt, when a direct injured ocular witness is available the motive is irrelevant, and therefore, assuming the evidence of P.W.1 is unreliable, the prosecution could rely upon the evidence of P.W.4 as a direct injured ocular witness.

19.2. As per the testimony of P.W.4, he was standing on the western side of the well when he was pushed into the well by the accused. Even though P.W.4 deposed that the accused pushed him and the deceased into the well and left the scene of occurrence, there is no explanation as to how the third parties namely, Parvathi, Madhu and Mani, arrived at the scene of occurrence at about 3 a.m. on 17.5.1989, and assuming the same is true, why the prosecution had not recorded statements from any of the said persons. That apart, the investigation is silent as to whether the persons who came to the scene of occurrence first reported to the Village Assistant, Muniyan, who was available in the same village, or the Village Administrative Officer (P.W.1) or the police about the occurrence, and if not, the reason for their silence.

19.3. P.W.4 further deposed that many people came to the spot immediately and P.W.5 bailed him out and thereafter, he was taken to K.N. Rao Hospital at Salem. When P.W.4 had deposed that he was taken by a cart till the main road, which is 1 km away from the scene of occurrence and thereafter, by a taxi, which was brought by one Shamugam, there is no proper explanation from the prosecution for not examining the said Shanmugam or the Taxi Driver. This again is considered to be a deficiency in the investigation.

19.4. P.W.4 also deposed that he was conscious when he was taken to the hospital, and became unconscious thereafter. But, the Doctor (P.W.2), who treated P.W.4 could not explain any grave nature of the injuries on P.W.4 nor produce any material evidence such as x-ray to substantiate that P.W.4 was seriously injured during the occurrence. On the other hand, P.W.4 in his cross examination, had stated that he was examined by P.W.10 only after 10 months. The whereabouts of P.W.4, during the said period of 10 months was not even properly explained by the prosecution; nor the Investigating Officer gave any acceptable or convincing reason for not enquiring P.W.4 immediately after the occurrence. This again is considered to be a blow on the case of the prosecution, particularly when the accused was charged and convicted under Section 307 I.P.C. for having attempted to murder P.W.4.

19.5. A closer scrutinisation of the testimony of P.W.4 would clearly reflect that he never bothered about his paramour, namely the deceased, either when both of them were pushed into the well or thereafter. Analysing the evidence of P.W.4 through his conduct, it is difficult to accept his version of evidence.

20.1. Apart from the evidence of P.W.1 and P.W.4, we are left with the evidence of other corroborative witnesses, viz., the medical evidence of P.W.2 and P.W.3; the evidence of P.W.5 and P.W.6 who spoke about the rescuing and shifting of P.W.4 for this treatment; the evidence of P.W.7, the father of P.W.4; and the evidence of Investigating officers P.W.10 and P.W.11.

20.2. P.W.5, deposed that he came to know about the incident at about 3 a.m. on 17.5.1989 from one Mani, but the said Mani was not examined. In the absence of clear evidence as to the source of information, the very arrival and the presence of P.W.5 at the place of occurrence at about 3 a.m. on 17.5.1989 was doubtful. Even though P.W.5 incidentally refers that one Shanmugam, Ammasi, Vijayagopal, Parvathi also knew about the incident, none of them were examined. According to the statement of P.W.5, P.W.7, the father of P.W.4, was very much present at the place of occurrence at the earliest point of time, namely, 3 a.m. along with fifty persons. This apparently reflects the total dereliction of duty on the part of the Investigating Officer for not having enquired P.W.7 immediately after the occurrence. It took almost one year for the Investigating Officer to enquire P.W.7, who was also residing in the very same village and moving around as the President of the Village Panchayat. Moreover, P.W.7, the father of P. W.4, himself had stated in his evidence that he was present at the scene of occurrence when P.W.10 Investigating Officer came at 12 noon on 17.5.1989 and prepared Ex.P4 Observation Mahazar and Ex.P8 Rough Sketch. But, P.W.10 has stated that he could not identify the parents of P.W.4. The conduct of the Investigating Officer in this regard shows a serious doubt about the standard of investigation as well as his integrity.

20.3. Even though P.W.4 was shifted to K.N.Rao Hospital at Salem by a taxi, as deposed by P.W.6, the taxi driver was not examined by the prosecution. That apart, the want of explanation by P.W6 for not informing the incident to the police, even after admitting P.W.4 in K.N.Rao Hospital, Salem, further creates a doubt on the case of the prosecution.

20.4. The other corroborative witness relied upon by the prosecution is P.W.7, the father of P.W.4. Admittedly, P.W.7 was present in the village on the fateful night. The evidence of P.Ws.1, 5, 6, 7 and 1 0 would depict that P.W.7 was seen in the place of occurrence at 8.30 a.m. itself on 17.5.1989 along with one Chinnasamy, Raman, and Munusamy. However, there was

no explanation by P.W.7 for not accompanying his son (P.W.4) to the hospital; nor there was any explanation by the prosecution for not recording any statement from P.W.7 immediately thereafter.

20.5. The other two corroborative witnesses relied upon by the prosecution are P.W.2 and P.W.3, the medical witnesses. There are about 2 1 injuries found on the body of the deceased as per the Post Mortem Certificate (Ex.P7), which corroborates with the evidence of P.W.3, who conducted post mortem on the body of the deceased (Dayawathi). On the other hand, when P.W.4 was also pushed into the same well, as per the evidence of P.W.2, the Medical Officer read with Wound Certificate (Ex.P5), only two injuries were found on the body of P.W.4. Both were pushed from the same place in the same

direction. If that is so, the prosecution had not explained as to how P.W.4 could sustain only two injuries when the deceased sustained 21 injuries. I have already opined that the injuries sustained by P.W.4 and the treatment said to have been given to him are all unbelievable for want of material evidence to corroborate the same. Therefore, the very presence of P.W.4 in the scene of occurrence and the charge that the accused pushed P.W.4 into the well, attempted to murder him, and thereby P.W.4 sustained serious injuries are all held to be not proved, particularly when the prosecution had not taken any steps to enquire P.W.4 for nearly 10 months, when P.W.4 was taking treatment in K.N.Rao Hospital, Salem, which is very near from the place of occurrence. Therefore, the evidence of medical witness (P.W.2) could not be relied upon.

20.6. I have already pointed out the lapses on the part of the Investigating Officers, namely P.W.10 and P.W.11. To pin point, as per the the prosecution case P.W.7, the father of P.W.4, was present at 3 a.m. on 17.5.1989 along with fifty persons, and again thereafter at 12 noon on 17.5.1989 when the investigating officer (P.W.10) came tot he scene of occurrence for preparing Observation Mahazar (Ex.P4) and the Rough Sketch (Ex.P8). In spite of the presence of P.W.7, the Investigating Officer (P.W.10) failed to record any statement from him, even though, by that time, P.W.4 was bailed out and shifted to K.N. Rao Hospital at Salem. On the other hand, the Investigating Officers, P.W.10 and P.W.11, had taken nearly about one year to enquire P.W.7 and record his statement, which is an incurable lapse on the part of the investigation and an unpardonable excuse for the dereliction of the public duty cast on the Investigating Officers, P.W.10 and P.W.11. Therefore, the evidence of P.W.10 and P.W.11 are not trustworthy.

21. A closer scrutinisation of the evidence of the prosecution would, therefore, go to show that there are grave deficiencies in the investigation and the prosecution failed to prove the charges beyond all reasonable doubts. In the premises aforesaid, I am inclined to allow the appeal, set aside the judgment dated 26.8.1996 rendered by the learned Principal Sessions Judge, Dharmapuri at Krishnagiri, in S.C.No.43 of 1992; and acquit the accused. Consequently, there will be a direction to cancel the bail bonds executed by the accused.

Index : Yes
Internet :Yes

atr/sasi

Copies to:-

1.The Principal Sessions Judge,
Dharmapuri at Krishnagiri (with records).

2.The Judicial Magistrate No.I,
Dharmapuri.

3.The Judicial Magistrate No.I, Dharmapuri,

through the Chief Judicial Magistrate,
Dharmapuri at Krishnagiri.

4.The Inspector of Police,
Papparapatti Police Station,
Dharmapuri.

5.The Public Prosecutor,
High Court,
Madras.

6.The Section Officer,
Criminal Section,
High Court, Madras.